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Torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report submitted by Theo van Boven, Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with resolution 56/143 of 19 December 2001.

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Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment

Summary

In the present report, the Special Rapporteur addresses the issue of the prohibition of torture and of cruel, inhuman or degrading treatment or punishment in the context of anti-terrorist measures. The Special Rapporteur concludes inter alia that the following basic legal safeguards should remain in any legislation relating to arrest and detention, including any type of anti-terrorist legislation, as these safeguards guarantee the access of any person in detention to the outside world and thus ensure his or her humane treatment: the right to habeas corpus; the right to have access to a lawyer within 24 hours from the time of arrest; and the right to inform a relative or friend about the detention. The Special Rapporteur also addresses the issues of the places and length of pre-trial detention and of admissibility of confessions in court, as well as the necessity to ensure that impunity will not prevail in cases of torture in all circumstances. He recalls the principle of non-refoulement in particular with respect to extradition cases. The Special Rapporteur then addresses the issue of international and national mechanisms for visits to places of deprivation of liberty. In that respect, he expresses the strong desire that the competent United Nations organs, notably the General Assembly, give the matter of an effective protocol to prevent torture their earnest and immediate attention with a view to the early adoption of that instrument. Finally, the Special Rapporteur recalls that any form of corporal punishment of children is contrary to established principles on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. He calls upon States to take adequate measures, in particular legal and educational ones, to ensure that the right of children to physical and mental integrity is well protected in the public and in the private spheres.

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1. The present report is the fourth report submitted to the General Assembly by the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, pursuant to General Assembly resolution 56/143 (paragraph 32) and Commission resolution 2002/38 (paragraph 31). It is the first report to be submitted by the present mandate-holder, Theo van Boven. Like his predecessor's reports, this report includes issues of special concern to the Special Rapporteur, in particular overall trends and recent developments.

I. The prohibition of torture and other forms of ill-treatment in the context of anti-terrorism measures

2. Ensuring security for all human beings has become one of the major challenges faced by the international community. Legislative and other measures to combat terrorism and protect national security have reportedly been flourishing in a number of countries in response to legitimate needs to prevent terrorist acts and punish those responsible for having financed, planned, supported or committed such acts. Fears have nevertheless been expressed that some of these measures may not fully respect basic human rights and fundamental freedoms. Calls for a fair balance between on the one hand the enjoyment of human rights and fundamental freedoms by all and on the other hand legitimate concerns over national and international security have thus been heard on several occasions.[1] In his remarks at the fifty-seventh session of the Commission on Human Rights, the Secretary-General stated that security could not be achieved by sacrificing human rights, and that to try and do so would hand the terrorists a victory beyond their dreams. On the contrary, greater respect for human rights, along with democracy and social justice, would in the long term prove the only effective prophylactic against terror. He remarked that the end does not justify the means, and that instead, the means tarnish, and may pervert, the end. Terrorism is one of the threats against which States must protect their citizens. They have not only the right, but also the duty, to do so. However, States must also take the greatest care to ensure that counter-terrorism does not, any more than sovereignty, become an all-embracing concept that is use to cloak, or justify, violations of human rights.

3. The Special Rapporteur notes that there is no internationally agreed definition of terrorism. The concept of terrorism, increasingly used in new legislation, is often construed as being too vague or as encompassing peaceful political opposition activities. The Declaration on Measures to Eliminate International Terrorism (resolution 49/60 of 9 December 1994, annex, para. 3) declares that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them". It further states that "acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security ... and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society" (para. 2).

4. Accordingly, in its resolution 1373 (2001) adopted under Chapter VII of the United Nations Charter ("Action with respect to threats to the peace, breaches of the peace, and acts of aggression"), the Security Council underscored the responsibility of all States to eradicate terrorism, and established the Counter-Terrorism Committee with a view to monitoring the implementation of this resolution, in particular with the assistance of appropriate expertise. As stated by the United Nations High Commissioner for Human Rights in her report to the last session of the Commission on Human Rights, several of the areas that the Committee intends to deal with, inter alia, drafting counter-terrorism legislation, financial law, customs law, immigration law, extradition law, police and law enforcement work, and illegal arms trafficking, have a strong human rights dimension. Owing to the serious human rights concerns that could arise from the misapplication of resolution 1373 (2001), it would be desirable that a human rights expert assist the Committee.[2] The Special Rapporteur fully supports the suggestion made by the High Commissioner, especially, from the perspective of his mandate, with respect to the issues of extradition law and police and law enforcement work.

5. According to information received by the Special Rapporteur, the provisions of some new anti-terrorist legislation at the national level may not provide sufficient legal safeguards as recognized by

international human rights law in order to prevent human rights violations, in particular those safeguards preventing and prohibiting torture and other forms of ill-treatment. In his first report to the Commission on Human Rights, the Special Rapporteur reviewed the non-derogable nature of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, in the context of renewed preoccupations with respect to human security in the aftermath of the terrorist attacks of 11 September 2001 in the United States of America. He concluded that the legal and moral basis for the prohibition of torture and other cruel, inhuman or degrading treatment or punishment was absolute and imperative and must under no circumstances yield or be subordinated to other interests, policies and practices.[3]

6. The Special Rapporteur hereby wishes briefly to review information he has received on measures designed or taken to counter national and international terrorism in the light of relevant standards of international human rights law, in particular those relating to arrest and pre-trial detention and due process of law, which must be respected in envisaging, enacting and implementing such measures.

A. Arrest, pre-trial detention, access to a lawyer and the right to habeas corpus

7. Extensive periods of detention in custody without charge or trial are said to have been contemplated or enacted in order to provide security and other forces with sufficient time to collect evidence leading to charges under anti-terrorist legislation. It has also been reported that by enacting laws providing for indefinite administrative detention as an alternative to prosecution, States have created informal criminal justice systems in which detainees are denied rights that they would normally have in the ordinary judicial systems. It has been implied that such lengthy periods of detention without judicial review might lead to their misuse by security and other forces for the aims of preventive detention and may thus facilitate the use of illegal methods to obtain confessions and other evidence. Furthermore, according to information that has been received, measures to permit the indefinite detention of foreign nationals alleged to pose a threat to national security are envisaged or have already been taken. It is believed that such administrative detention would allow the relevant authorities to detain foreigners believed to pose a security threat but who cannot be deported to their country of origin without violating the principle of non-refoulement (see below, paras. 27 ff.).

8. The Special Rapporteur would like to recall article 9, paragraph 3, of the International Covenant on Civil and Political Rights, which states that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". Paragraph 4 of the same article provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (right to habeas corpus). He also notes that the Basic Principles on the Role of Lawyers provide for all persons arrested or detained to be informed of their right to be assisted by a lawyer of their choice or a State-appointed lawyer (principles 5 and 6); to have prompt access to this lawyer, and "in any case not later than forty-eight hours from the time of arrest or detention" (principle 7); and to be "provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship, and in full confidentiality" (principle 8).

9. In its general comment No. 8 of 30 June 1982, the Human Rights Committee stated that in the view of the Committee, delays in bringing anyone arrested or detained in a criminal case before a judge or other officer authorized by law to exercise judicial power must not exceed a few days. In its concluding observations of the periodic report on Zimbabwe, the Human Rights Committee indicated for example, that the law relating to arrest and detention should ensure that individuals are not held in pre-trial custody for longer than 48 hours without court order.[4]

10. With respect to persons arrested under suspicion of terrorist activities, attention is drawn to the findings of the Human Rights Committee regarding the fifth periodic report submitted by the United Kingdom of Great Britain and Northern Ireland under the International Covenant on Civil and Political Rights: "The Committee notes with concern that, under the general Terrorism Act 2000, suspects may be detained for 48 hours without access to a lawyer if the police suspect that such access would lead, for example, to

interference with evidence or alerting another suspect. Particularly in circumstances ... where their compatibility with articles 9 and 14 inter alia is suspect, and where other less intrusive means for achieving the same ends exist, the Committee considers that the State party has failed to justify these powers."

11. The Special Rapporteur notes that regional human rights bodies have reached similar conclusions. The European Court on Human Rights, in relation with article 5, paragraph 3 (the right to be promptly brought before a judge) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, stated in the case of *Brogan and others versus the United Kingdom* that the investigation of terrorist offences undoubtedly presented the authorities with special problems. The Court accepted that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland had the effect of prolonging the period during which the authorities might, without violating article 5, paragraph 3, keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer. The Court indicated that the scope for flexibility in interpreting and applying the notion of "promptness" was very limited. In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody, fell outside the strict constraints as to time permitted by the first part of article 5 paragraph 3.[6] The European Court of Human Rights further indicated that the word "promptly" could not be widely interpreted without seriously weakening a procedural guarantee to the detriment of the individual and the very essence of the right to be free from arbitrary arrest, even if public security were at stake. The Court stated that the undoubted fact that the arrest and detention of the applicants had been inspired by the legitimate aim of protecting the community as a whole from terrorism was not on its own sufficient to ensure compliance with the specific requirements of article 5, paragraph 3.[7]

12. With respect to the adequate safeguards referred to above, the European Court decided in the case of *Brannigan and McBride versus the United Kingdom* that the following elements were adequate and sufficient safeguards against abuse: (a) the remedy of habeas corpus is available to test the lawfulness of the original arrest and detention, and it provides an important measure of protection against arbitrary detention; and (b) detainees have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest. Moreover, within that period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. In the Court's view, it was clear that the decision to delay access to a solicitor was susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rested on the authorities. The Court also stated that it was not disputed that detainees are entitled to inform a relative or friend about their detention and to have access to a doctor.[8] The right to habeas corpus and a very limited period of incommunicado detention, that is, 48 hours, seemed to constitute the core legal safeguards to be guaranteed to anyone under arrest.

13. In the case of *Aksoy versus Turkey*, the European Court on Human Rights confirmed that measures aimed at derogating the right to habeas corpus (it must be recalled that Turkey had deposited a notification of derogation in respect of article 5, paragraph 3) would in any case not fulfil the criteria set up in the provision allowing derogations from certain rights in time of public emergency, that is, to be strictly required by the exigencies of the situation. The Court stated that it had taken account of the unquestionably serious problem of terrorism in South-east Turkey and the difficulties faced by the State in taking effective measures against it. However, it was not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer.[9] The Court further stated that the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that the applicant was left completely at the mercy of those holding him.[10]

14. Similarly, the Inter-American Court on Human Rights in its advisory opinion on *Habeas Corpus in Emergency Situations* concluded unanimously that the right to habeas corpus cannot be suspended because it is a judicial guarantee essential for the protection of the rights and freedoms whose suspension is prohibited under the American Convention on Human Rights. In particular, the Inter-American Court stated that, in order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be

brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhuman, or degrading punishment or treatment.[11]

15. Judicial control of interference by the executive power with the individual's right to liberty is an essential feature of the rule of law. With respect to the non-derogability of the right to habeas corpus, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the question of human rights and state of emergency, Leandro Despouy, noted that the lessons to be drawn from the practice of States were also important for this clarification, since experience had shown that Governments generally understood that there must be no limitations on habeas corpus in states of emergency. This was demonstrated by the fact that the Special Rapporteur had received only one notification of the suspension of this remedy, and that was 10 years ago. Concurrently, the Human Rights Committee, in response to a resolution of the Sub-Commission advocating the preparation of a draft protocol to prohibit any derogation from articles 9, paragraph 3, and 14 of the International Covenant on Civil and Political Rights, said that it was convinced that States parties as a rule understood that the remedies of habeas corpus and amparo should not be restricted in states of emergency. Likewise, the Committee, when considering the report of a State party, pointed out that measures adopted by a Government to combat terrorism should not affect the exercise of the fundamental rights set forth in the Covenant, and in particular those in articles 6, 7 and 9.[12]

16. Following the view expressed by the regional human rights courts referred to above, the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment is of the view that prompt judicial intervention serves as a guarantee that there will be no breach of the non-derogable right not to be subjected to torture or other forms of ill-treatment. His predecessor has constantly argued that the use of incommunicado detention should be considered unlawful. The set of recommendations that he included in his last report to the General Assembly,[13] recommendations with which the current mandate-holder fully associated himself,[14] calls upon States to take appropriate measures to abrogate incommunicado detention as torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention. Security personnel who do not honour such provisions should be punished. In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association. In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours.[15] Accordingly, since 1999, the Commission on Human Rights has reminded all States that prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment.[16] The previous Special Rapporteur further recommended that provisions should give all detained persons the ability to challenge the lawfulness of the detention, such as through habeas corpus or amparo; and that such procedures should function expeditiously.[17]

17. The Special Rapporteur notes that the above-mentioned findings apply to all forms of deprivation of liberty, including administrative detention and immigration control measures. The Human Rights Committee in its general comment No. 8 on article 9 of the International Covenant on Civil and Political Rights stated that if so-called preventive detention was used, for reasons of public security, it had to be controlled by these same provisions, that is, it must not be arbitrary and must be based on grounds and procedures established by law (paragraph 1); information on the reasons must be given (paragraph 2); and court control of the detention must be available (paragraph 4) as well as compensation in the case of a breach (paragraph 5). If, in addition, criminal charges were brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, also had to be granted.[18]

18. The Special Rapporteur is therefore of the view that, in accordance with international law, and as

confirmed by States' practice, the following basic legal safeguards should remain in fact in any legislation relating to arrest and detention, including any type of anti-terrorist legislation: the right to habeas corpus, the right to have access to a lawyer within 24 hours from the time of arrest and the right to inform a relative or friend about the detention. These safeguards guarantee the access of any person in detention to the outside world and thus ensure his or her humane treatment while in detention.

B. Places of pre-trial detention

19. The Special Rapporteur has been informed that some laws would allow security and other forces carrying out the investigation, in particular police, to request the transfer of an accused person from judicial custody to their custody for a period of time for the purposes of further investigation. As stated by his predecessor, the Special Rapporteur recommends that those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted.[19]

20. The Special Rapporteur would also recommend that at the time of arrest, a person should undergo a medical inspection, and that medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention.[20] The Standard Minimum Rules for the Treatment of Prisoners also recommend that the medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary (rule 24).

C. Length of pre-trial detention

21. National judicial authorities must also ensure that the detention of an accused person pending trial does not exceed a reasonable time, taking into consideration whether there exists a genuine requirement of public interest justifying, with due regard to the principle of presumption of innocence, a departure from the rule of respect for individual liberty. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the arrest in the first place and then of the continuation of the detention. Special diligence must prevail in any criminal proceedings. The Special Rapporteur would like to recall that the exigencies of dealing with terrorist criminal activities cannot justify interpreting the notion of the "reasonableness" of the suspicion on which an arrest and then a detention may be based, to the point of impairing its very meaning. According to the Human Rights Committee, pre-trial detention should be an exception and as short as possible.[21] Regular periodic review of the lawfulness and continuing necessity of the detention should thus be carried out by an independent and impartial court of law with a view to re-examining the reasonableness of the suspicion on which the detention is based.

D. Confessions and evidence

22. Fears have been expressed that confessions or evidence extracted by illegal means during interrogation would be admissible in court when dealing with terrorist charges. The Special Rapporteur would like to recall article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which clearly states that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". Accordingly, the previous Special Rapporteur has constantly recommended that no statement of confession made by a person deprived of liberty, other than one made in presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained the confession by unlawful means. Serious consideration should be given to introducing video- and audiotaping of proceedings in interrogation rooms.[22] He further recommended that each interrogation should be initiated with the identification of all persons present, and that all interrogation sessions should be recorded and preferably videorecorded. The identity of all persons present should be included in the records, and evidence from non-recorded interrogations should be excluded from court proceedings.[23] It should be noted that the Basic Principles on the Role of Lawyers provide that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of

criminal proceedings (principle 1). Similarly, the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provide for the right of all detained persons to have access to a lawyer during pre-trial detention and investigation.

23. The Special Rapporteur would also like to recall the following recommendation made by his predecessor: "Where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to probe beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment".[24]

24. With respect to the specific situation often referred to as the "ticking bomb" scenario, i.e., a situation which would allow torturing somebody deemed to have crucial information on a bomb said to explode shortly and which could potentially kill innocent civilians, the Special Rapporteur would like to call to mind that there must be no derogation to the prohibition of torture under international law. He would like in particular to draw attention to the concluding observations of the Committee against Torture upon its recent consideration of the periodic report of Israel under the Convention against Torture, in which the Committee stated that it was fully aware of the difficult situation of unrest faced by Israel, particularly in the occupied territories, and understood its security concerns. While recognizing the right of Israel to protect its citizens from violence, the Committee stated that no exceptional circumstances may be invoked as justification of torture.[25]

E. Immunity from prosecution of law enforcement officials

25. According to other information that the Special Rapporteur has received, under some anti-terrorist legislation, security and other forces would be immune from sanctions even when the safeguards outlined above are not complied with. Thus, it is reported that laws provide for immunity from prosecution for any authority on whom powers have been conferred under the concerned anti-terrorist laws, for anything which is done in good faith. It is feared that such provisions may effectively constitute an offer of impunity to law enforcement agents who use torture or cruel, inhuman or degrading treatment during interrogations. The term "good faith", for example, is in this context extremely wide-ranging and subjective. It could even be claimed that torture of an arrested person suspected of terrorist activities is an act done in good faith, for example, for the purpose of the fight against terrorism.

26. The Special Rapporteur reminds States parties of their obligations under the Convention against Torture to ensure that "all acts of torture are offences under [their] criminal law" (article 4); that "its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under [their] jurisdiction" (article 12); and that "any individual who alleges he has been subjected to torture in any territory under [their] jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities" (article 13). In that respect, the following recommendations made by his predecessor are pertinent: when a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place and, unless the allegation is manifestly ill-founded, public officials involved should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings; a person in respect of whom there is credible evidence of responsibility for torture or severe maltreatment should be tried and, if found guilty, punished; and legal provisions granting exemptions from criminal responsibility for torturers, such as amnesties or indemnity laws should be abrogated.[26]

F. The right to seek asylum, the principle of non-refoulement and extradition

27. The Special Rapporteur has received information according to which the right to seek asylum, which is enshrined in the Universal Declaration of Human Rights (article 14), has been unduly restricted by what are meant to be anti-terrorist measures. Particular groups of migrants are said to have been discriminated against and fears have been expressed that, in the name of the fight against terrorism, asylum has been given a very restrictive interpretation.

28. In this regard, reference is made to the 1951 Convention relating to the Status of Refugees, which provides exclusion clauses from the status of refugee. The Convention shall not apply to any person with respect to whom there are serious reasons for

considering that (a) he has committed a crime against peace, a war crime, or a crime against humanity; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations (article 1 [f]). Acts of terrorism may, in some instances, certainly fall within one of these exclusion clauses. This, however, does not mean that the request for asylum of persons suspected of such acts should not be examined in accordance with all safeguards provided in human rights and refugee law.

29. It also noted that article 33, paragraph 2, of the 1951 Convention relating to the Status of Refugees provides for the only exception to the principle of non-refoulement in cases which arguably may relate to persons suspected of terrorism. Indeed, this paragraph reads as follows: "the benefit of the present provision [i.e., principle of non-refoulement] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

30. Nevertheless, the Special Rapporteur would like to draw attention to the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, published by the Office of the United Nations High Commissioner for Refugees (UNHCR), which clearly states that an application for refugee status by a person having (or presumed to have) used force, or to have committed acts of violence of whatever nature and within whatever context, must in the first place — like any other application — be examined from the standpoint of the inclusion clauses in the 1951 Convention.[27] Thus, the determination of refugee status on the basis of the full and fair individual review of an asylum-seeker's claim should always take place before authorities assess the actual and direct danger posed by the presence of an asylum-seeker to the national security of the hosting community. It has been reported that the more restrictive immigration policies were aimed at reversing the "inclusion before exclusion" approach advocated by UNHCR. The Handbook also states that due to their nature and the serious consequences of their application to a person in fear of persecution, the exclusion clauses should be applied in a restrictive manner.[28]

31. It is indeed a matter of law that serious criminals also deserve protection against persecution or prejudice, under full recognition that they should not escape trial and punishment. The Special Rapporteur would like to draw the attention of the General Assembly to his report to the last session of the Commission on Human Rights (E/CN.4/2002/137) in which he underlined the link between the non-derogable nature of the prohibition of torture and other forms of ill-treatment, and the principle of non-refoulement. In particular, reference was made to the Human Rights Committee's general comment 20 on article 7, and to article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The latter provides that no State party shall expel, return (refouler), or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. The principle contained in the Human Rights Committee's statement and the above provision of the Convention against Torture are an inherent part of the overall fundamental obligation to avoid contributing in any way to a violation of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. State practice, and the greater body of opinion, representing those most active in the protection of refugees and the development of refugee law, regards the principle of non-refoulement as likewise protecting the refugee from extradition.[29]

32. With respect to the pre-eminence of the principle of non-refoulement, the Special Rapporteur would like to underline the opinion of the European Court on Human Rights in the case of *Chahal versus the United Kingdom* in which the Court stated that the prohibition provided by article 3 [of the European Convention on Human Rights, i.e., prohibition of torture] against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by

article 3 is thus wider than that provided by articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[30]

33. With respect to extradition, attention is drawn to the conclusions of the UNHCR Executive Committee (No. 17 [XXXI]-1980) on Problems of Extradition affecting Refugees, which called upon States to ensure that the principle of non-refoulement is duly taken into account in treaties relating to extradition and as appropriate in national legislation on the subject, and stressed that nothing in those conclusions should be considered as affecting the necessity for States to ensure, on the basis of national legislation and international instruments, punishment for serious offences, such as the unlawful seizure of aircraft, the taking of hostages and murder. In line with that recommendation, the Special Rapporteur would like to encourage States to include the principle *aut dedere aut judicare* in instruments aimed at international cooperation with respect to criminal matters.

34. The Special Rapporteur would like to remind States that in respect of certain crimes such as crimes against humanity and presumably certain terrorist acts, international law permits, and in some cases requires, States to exercise jurisdiction on the mere basis of presence in their territory of suspected perpetrators of such crimes. In a number of countries national legislation to that effect may still need to be enacted. He also would like to stress the possibility of prosecution of those charged with terrorist acts that qualify as crimes against humanity under the Rome Statute of the International Criminal Court, with due regard to the principle of complementarity laid down in the Rome Statute.

35. Finally, the Special Rapporteur would like to appeal to all States to ensure that in all appropriate circumstances the persons they intend to extradite, under terrorist or other charges, will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity.

II. International and national mechanisms for visits to places of deprivation of liberty

36. In his last report to the General Assembly, the previous Special Rapporteur addressed the general issue of prevention and transparency[31] and advocated replacing the paradigm of opacity surrounding the places of deprivation of liberty by one of transparency. The present mandate-holder fully supports the recommendation made by his predecessor with respect to the importance of external supervision of all places of deprivation of liberty by independent officials, such as judges, prosecutors, ombudsmen and national or human rights commissions, and by civil society as well as by independent monitoring institutions, such as the International Committee of the Red Cross and the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment (CPT) under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the mechanism contemplated by the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Both the protective and preventive roles of such mechanisms have been duly recognized.

37. The Special Rapporteur welcomes the decision of the fifty-eighth session of the Commission on Human Rights concerning the draft optional protocol, which is the result of a process of consultations and negotiations over the past decade, and whose objective is, as provided for in draft article 1, to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and cruel, inhuman or degrading treatment or punishment. As suggested by the Joint Declaration issued on 26 June 2002 by the Special Rapporteur, the Committee against Torture, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the United Nations High Commissioner for Human Rights on the occasion of the United Nations Day in Support of Victims of Torture (see annex), focused visits by independent multidisciplinary teams of experts to places of detention and other places where persons are deprived of their liberty have proved to be a most effective way to prevent torture.

38. Law enforcement officials and other detention personnel and authorities who are aware that their

behaviour may be scrutinized at any point by internal and external monitoring bodies are certainly much more inclined to follow existing rules and procedures pertaining to arrest and detention. Most legal systems have established procedures which, if properly applied, would drastically diminish the opportunities to commit torture and other forms of ill-treatment. Indeed, such safeguards as prompt access to lawyers, the family and/or a medical doctor, as well as the right to habeas corpus, remove a person from the potential arbitrariness of the detaining powers. The preventive effect of the existence of such monitoring mechanisms, especially when the concerned parties conduct ad hoc unannounced visits, should not be ignored.

39. The Special Rapporteur would strongly encourage senior law enforcement officials to carry out such visits with a view to obtaining a direct knowledge of how legal safeguards guaranteed under the law are respected in practice and what detention conditions prevail for those under their jurisdiction. Similarly, visits by independent police and prison ombudspersons have proved to be valuable preventive mechanisms, especially when the latter can make their recommendations public. Making law enforcement and other detention officials accountable, administratively, and if necessary criminally, for unlawful and unacceptable behaviour — an end to impunity — is certainly an effective means to achieve the prevention of torture and other forms of ill-treatment. The Special Rapporteur, however, notes that for the time being, too few systems have established such independent supervisory bodies within their law enforcement agencies.

40. The Special Rapporteur is convinced of the added value offered by independent external visiting mechanisms. He believes that such bodies would make false accusations of abuse falling within his mandate — always difficult for law enforcement officials to refute — much harder to sustain. External bodies may thus become relevant resources in clarifying circumstances surrounding allegations of torture and ill-treatment.

41. Furthermore, external mechanisms should be in a position to suggest to the relevant authorities legal and practical improvements by referring to best practices encountered in other similar situations. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, a body that has visited places of detention in more than 40 States members of the Council of Europe, has demonstrated the preventive value of its visits and recommendations. As pointed out by the wide coalition of international non-governmental organizations,[32] supporting the draft optional protocol referred to in paragraph 37 above, the effectiveness of the optional protocol as a preventive instrument lies in the principle of cooperation and dialogue, which underscores the provisions of the instrument.

42. As indicated by the previous Special Rapporteur, the approaches advocated here would help some authorities develop a constituency to support the granting of needed budgetary resources, frequently wholly inadequate because of the low political priority for the area. It could draw attention to the often parlous conditions of work, residence and sustenance of police and prison personnel, which in turn could contribute to their being trained, paid and valued to act as professionals.[33] In that respect, it should be noted that the optional protocol establishes a special fund to help finance the implementation of the recommendations made by the international mechanism for visits, as well as to contribute to educational and technical assistance programmes at the national level.

43. When authorized to carry out visits to places of detention, the competent and committed organs of civil society play a crucial role. Through their daily contacts with local authorities and their regular visits of places of detention, as well as their willingness to alert relevant national and international mechanisms, they see to it that the necessary measures are taken in a timely manner with a view to respecting the fundamental principle that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. By often providing detainees with means of subsistence and moral support, these organs of civil society also serve as intermediaries between police and prison personnel and persons under arrest or detention and may thus release tensions, and accordingly improve the quality of life for all concerned. Their supportive role will be reinforced by the establishment, through the optional protocol, of bodies specifically designed at the domestic and international levels to assist Governments in preventing torture. They should also be instrumental in helping ensure some kind of follow-up to national and international mechanisms' recommendations and see to it that the progress made will be lasting in nature.

44. The Special Rapporteur welcomes the decision by an increasing number of States to extend a standing invitation to all special procedures of the Commission on Human Rights,[34] a number of which carry out visits to places of detention. These commitments to cooperate more closely with United Nations human rights mechanisms and programmes also show the interest on the part of State authorities to receive advice and recommendations from independent experts to better enhance and protect human rights, in particular with respect to issues relating to the deprivation of liberty.

45. The Special Rapporteur therefore expresses the strong wish that the competent United Nations organs, notably the General Assembly, give the matter of an effective protocol to prevent torture its earnest and immediate attention with a view to the early adoption of this instrument.

III. Corporal punishment of children

46. Early this year, the Special Rapporteur joined the Global Initiative to End All Corporal Punishment of Children[35] launched in April 2001. According to the information received, corporal punishment in the family home, in State institutions, in schools, in penal institutions for juvenile offenders and in other institutions remains legally as well as culturally widely accepted in a large number of countries. In particular, moderate and reasonable chastisement or correction, which often involve the use of implements such as belts, canes or slippers, have been justified for educational purposes. It is reported by non-governmental organizations that corporal punishment is still available as a sentence for juvenile offenders in some 50 States and as a punishment in schools and other institutions in some 65 States.[36] It is also reported that only the nine following States have explicitly prohibited the corporal punishment of children: Austria (1989), Croatia (1999), Cyprus (1994), Denmark (1997), Finland (1983), Germany (2000), Latvia (1998), Norway (1987) and Sweden (1979).

47. Not only is the practice of punishing children with the use of physical force often said to cause serious physical and psychological injury or even death, it is also believed that this practice plays a significant role in the development of violent behaviours and actions, both in childhood and later in adulthood. It is further reported that gender and racial discrimination are important factors in the application of physical violence as a form of punishment. The Special Rapporteur strongly believes that efforts must now be made to promote dialogue between generations and envisage positive, non-violent forms of discipline and punishment that are based on respect for the physical and psychological integrity of the child and his or her inherent dignity.

48. The Special Rapporteur notes that both of his predecessors took the view, which he fully shares, that corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined in the Universal Declaration of Human Rights.[37] Since 1997, the Commission on Human Rights has upheld this opinion by reminding Governments that corporal punishment can amount to cruel, inhuman or degrading punishment or even to torture.[38] The Human Rights Committee previously indicated in its general comment No. 20 on article 7 of the International Covenant on Civil and Political Rights (prohibition of torture and other cruel, inhuman or degrading treatment or punishment) that the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.[39]

49. The Special Rapporteur would like to draw attention to the findings of the Committee on the Rights of the Child, in particular with respect to the child's right to physical integrity guaranteed by article 19 and article 28, paragraph 2, of the Convention on the Rights of the Child.[40] The Committee stressed that corporal punishment of children is incompatible with the Convention and has often proposed the revising of existing legislation, as well as the development of awareness and educational campaigns, to prevent child abuse and the physical punishment of children.[41] The Committee further recommended that States parties review all relevant legislation to ensure that all forms of violence against children, however light, are prohibited, including the use of torture, or cruel, inhuman or degrading treatment (such as flogging, corporal punishment or other violent measures) for punishment or disciplining within the

child justice system, or in any other context. The Committee recommends that such legislation incorporate appropriate sanctions for violations and the provision of rehabilitation for victims. The Committee urges the launching of public information campaigns to raise awareness and sensitize the public about the severity of human rights violations in this domain and their harmful impact on children, and to address cultural acceptance of violence against children promoting instead zero-tolerance of violence.[42] Accordingly, in its guidelines for periodic reports, the Committee requested States parties to submit information indicating whether legislation (criminal and/or family law) includes a prohibition of all forms of physical and mental violence, including corporal punishment, deliberate humiliation, injury, abuse, neglect or exploitation, inter alia, within the family, in foster and other forms of care, and in public or private institutions, such as penal institutions and schools. The reports should also include the educational and other measures adopted to promote positive and non-violent forms of discipline, care and treatment of the child.[43]

50. With respect to corporal punishment as a sentence for juvenile offenders or as a disciplinary measure in penal institutions, the Special Rapporteur recalls the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), which state that juveniles shall not be subject to corporal punishment.[44] Similarly, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty state that all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, or any other punishment that may compromise the physical or mental health of the juvenile concerned.[45]

51. With respect to corporal punishment in schools, the Special Rapporteur notes that the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) state that no child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions.[46] He welcomes the decision of the Commission on Human Rights at its last session to urge all States to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse in schools, and to incorporate in their legislation appropriate sanctions for violations and the provision of redress and rehabilitation for victims and in this context to take measures to eliminate corporal punishment in schools.[47]

52. With respect to what is often referred as moderate chastisement or correction of children in the family home, attention is drawn to a recent case of the European Court on Human Rights, *A. versus the United Kingdom*. The European Court noted that children and other vulnerable individuals, in particular, were entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity and therefore, concluded that the law did not provide adequate protection to the applicant against treatment or punishment contrary to article 3.[48] As early as 1982 the European Commission of Human Rights had already rejected an application by Swedish parents who alleged that the 1979 ban on parental physical punishment breached their right to respect for family life. The Commission concluded that the actual effects of the law were to encourage a positive review of the punishment of children by their parents, to discourage abuse and to prevent excesses which could properly be described as violence against children.[49]

53. On the basis of the above-mentioned analysis, the Special Rapporteur believes that any form of corporal punishment of children is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. He therefore calls upon States to take adequate measures, in particular legal and educational ones, to ensure that the right to physical and mental integrity of children is well protected in the public and in the private spheres. He would also welcome information from governmental and non-governmental sources on measures taken to eradicate the practice of corporal punishment of children.

Notes

[1] See in particular "Message by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day, 10 December 2001 (E/CN.4/2002/137, annex).

[2] E/CN.4/2002/18, para. 31.

[3] E/CN.4/2002/137, para. 15.

[4] CCPR/C/79/Add. 89, para 17.

[5] CCPR/CO/73/UK; CCPR/CO/73/UKOT, para. 19.

[6] *Brogan and others versus the United Kingdom*, European Court of Human Rights, *Judgement* (Merits), 29 November 1988, paras. 61 and 62.

[7] Ibid., para. 62.

[8] *Brannigan and McBride versus the United Kingdom*, European Court of Human Rights, *Judgements* (Merits), 26 May 1993, paras. 63 and 64.

[9] *Aksoy versus Turkey*, European Court of Human Rights, *Judgement* (Merits and just satisfaction), 18 December 1996, para. 84.

[10] Ibid., para. 83.

[11] Habeas Corpus in Emergency Situations, Inter-American Court on Human Rights, *Advisory opinion*, OC-8/87, 30 January 1987, para. 35.

[12] E/CN.4/Sub.2/1997/19, para. 111.

[13] A/56/156, para. 39.

[14] See E/CN.4/2002/137, para. 7.

[15] A/56/156, para. 39 (f).

[16] Commission on Human Rights resolution 1999/32, para. 5.

[17] A/56/156, para. 39 (h).

[18] See HRI/GEN/1/Rev.5, General Comment No. 8 (Right to liberty and security of persons), 30 June 1982, para. 4.

[19] A/56/156, para. 39 (f).

[20] Ibid.

[21] HRI/GEN/1/Rev.5, General Comment No. 8, para. 3.

[22] See A/56/156, para. 39 (d).

[23] See A/56/156, para. 39 (f).

[24] See A/56/156, para. 39 (j).

[25] CAT/C/XXVII/Concl.5.

[26] See A/56/156, para. 39 (j).

[27] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (HCR/IP/4/Eng/Rev.1), para. 176.

[28] Ibid., para. 180.

[29] Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edition (Oxford, England, Oxford University Press, 1996), p. 150.

[30] *Chahal versus the United Kingdom*, European Court of Human Rights, *Judgement* (Merits and just satisfaction), 15 November 1996, para. 80.

[31] See A/56/156, paras 34-38.

[32] The coalition of international non-governmental organizations consists of the following: Association for the Prevention of Torture, World Organization against Torture, Fédération internationale de l'action des Chrétiens pour l'abolition de la torture, Fédération international des ligues des droits de l'homme, Human Rights Watch, International Commission of Jurists, International Rehabilitation Council for Torture Victims, International League for Human Rights, International Service for Human Rights, Amnesty International and Redress.

[33] A/56/156, para. 36.

[34] As of May 2002, the following countries had extended standing invitations to the thematic special procedures of the Commission on Human Rights: Austria, Belgium, Brazil, Bulgaria, Canada, Costa Rica, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Georgia, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Norway, Peru, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland.

[35] For more information, see *Global Initiative to End All Corporal Punishment*. Available from http://www.endcorporalpunishment.org

[36] EPOCH-Worldwide is an informal alliance of non-governmental organizations which aim is to end all forms of corporal punishment of children.

[37] See E/CN.4/1993/26, para. 593, and E/CN.4/1997/7, paras 4-11.

[38] Commission on Human Rights resolution 1997/38, para. 9.

[39] HRI/GEN/1/Rev.5, General Comment No. 20, 10 March 1992, para. 5.

[40] Article 19, paragraph 1, of the Convention on the Rights of the Child states the following: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".

[41] See CRC/C/34, annex IV, section II (B).

[42] A/57/41, paras. 8 and 14 (a). See also *Report and General Recommendations: Committee on the Rights of the Child*, Day of General Discussion Geneva, 22 September 2000. Available from www.unhchr.ch/html/menu2/6/crcdod.htm

[43] CRC/C/58, para. 88.

[44] General Assembly resolution 40/33 of 29 November 1985, annex, rule 17 (3).

[45] General Assembly resolution 45/113 of 14 December 1990, annex, rule 67.

[46] General Assembly resolution 45/112 of 14 December 1990, annex, para. 54.

[47] Commission on Human Rights resolution 2002/23, para. 4 (m).

[48] *A. versus the United Kingdom*, European Court of Human Rights Judgement (Merits and just satisfaction), 23 September 1998, paras. 22 and 24.

[49] *Seven Individuals versus Sweden*, European Commission of Human Rights, Admissibility Decision, 13 May 1982.

Annex

Joint Declaration on the occasion of the United Nations International Day in Support of Victims of Torture, 26 June 2002

The Committee against Torture, the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the United Nations High Commissioner for Human Rights welcome the decision of the Commission on Human Rights at its fifty-eighth session to adopt, and recommend to the Economic and Social Council, the text of the optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That decision was the result of a decade-long process of consultation and negotiation.

The optional protocol is designed to assist States parties in implementing their obligation under the Convention to prevent torture by providing for the establishment of effective international and national mechanisms for visiting places where persons are or may be deprived of their liberty. Visits to such places by independent multidisciplinary teams of experts have proved to be a very effective way to prevent treatment of detainees that violates international standards. Both the protective and preventive roles of such mechanisms should be stressed.

On the occasion of the United Nations International Day in Support of Victims of Torture, we call upon the States Members of the United Nations at the Economic and Social Council and the General Assembly to give the matter of an effective protocol to the Convention their earnest and immediate attention, and to move towards the final adoption of this instrument.

We also pay tribute to and continue to support those States and organizations of civil society that are committed to ending the practice of torture and are engaged in activities aimed at preventing it and securing redress for its victims.